In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1303

JUANELLE TUBBS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Texas (Pet. App. 29-34) is reported at 348 F. Supp. 1404. The opinion of the court of appeals (Pet. App. 28-29) is reported at 472 F. 2d 166.

JURISDICTION

The judgment of the court of appeals was entered on January 15, 1973. A petition for rehearing was denied on February 16, 1973. The petition for a writ of certiorari was filed on March 26, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals erred in holding that decedent, who conveyed legal title to an undivided interest in certain real property to petitioner, but who continued

until her death to treat income from the property as her own, had retained for the remainder of her lifetime the "enjoyment" of the property justifying inclusion of that property in her gross estate pursuant to Section 2036(a)(1) of the Internal Revenue Code of 1954.

STATUTE INVOLVED

Section 2036(a)(1) of the Internal Revenue Code of 1954 (26 U.S.C.) is reproduced at Pet. 4.

STATEMENT

During 1961, Mrs. Linnie R. Garrard (decedent), desiring to give part of her 1,293-acre real estate holdings to her daughter, Mrs. Juanelle Tubbs (petitioner),[1] conveyed to petitioner legal title to an undivided 480-acre interest in that real estate. From the date of the conveyance until decedent's death, nearly four years later, decedent continued to receive all the rental income from the entire 1,293-acre tract. Petitioner did not live on the land conveyed to her, nor was she familiar with the farming operations conducted on the land. Although constantly in communication with her mother, petitioner never discussed the disposition of the income derived from the land her mother had conveyed to her, and although she knew decedent was receiving and partially saving the income from the entire tract, she kept no records or accounts of that income. At no time did petitioner object to decedent's receipt or retention of the income, nor did petitioner demand that the income be paid to her. Decedent, rather than petitioner, paid all real

---

[1]Petitioner was the sole heir and executrix of her mother's estate. (Pet. App. 29.) Petitioner paid the estate tax deficiency plus interest and filed this action in her own behalf as sole beneficiary of the estate after the estate administration had been closed.

estate and income taxes and all other expenses related to the entire 1,293-acre tract, and decedent claimed all appropriate income tax deductions for these expenses and for depreciation of all improvements and machinery on the property. (Pet. App. 29-31.)

Petitioner and her family received various sums from decedent during the period in issue but these sums were considered by petitioner to be "gifts," rather than payments of petitioner's share of the rental income. Petitioner stated that the rental income on her part of the property would have been turned over to petitioner if she "needed" it, and that, in any event, she would "inherit" all remaining income at decedent's death. (R. 9, 45, 49, 60.)[2] The Internal Revenue Service determined that, under these circumstances, the value of the undivided 480-acre interest was includable in decedent's gross estate for federal estate tax purposes. Petitioner paid the deficiency plus interest and sought refund in the district court. A verdict was directed against the petitioner and the court of appeals affirmed *per curiam*. (Pet. App. 35-36.)

ARGUMENT

The decision below is correct. There is no conflict of decisions or any other reason for further review by this Court.

1. Under Section 2036(a)(1) of the Internal Revenue Code of 1954, the gross estate for estate tax purposes includes the value of all property transferred during the decedent's lifetime (except pursuant to a bona fide sale for adequate and full consideration in money or money's worth) if the decedent retained for life "the

---

[2]"R." references are to the record appendix filed in the court of appeals.

possession or enjoyment of, or the right to the income from, the property***." The retention of "possession or enjoyment" need not be expressly set forth in the conveying instrument, or, indeed, in any other writing. *McNichol's Estate* v. *Commissioner,* 265 F. 2d 667, 670 (C.A. 3), certiorari denied, 361 U.S. 829. Rather "possession or enjoyment" may be "retained pursuant to an understanding or arrangement" among the parties, which may be ascertained or implied from an examination of the circumstances surrounding the transfer. *Guynn* v. *United States,* 437 F. 2d 1148, 1150 (C.A. 4); *Skinner's Estate* v. *United States,* 316 F. 2d 517 (C.A. 3).

On the basis of the uncontradicted and undisputed evidence of record in this case, the trial court concluded that an implied agreement or understanding existed between decedent and petitioner that the former would retain possession and enjoyment of the rental income for the remainder of her life. Contrary to petitioner's contentions, there was not sufficient evidence in the record to justify or require submission to a jury of the issue whether there was an implicit agreement. Petitioner, in close communication with decedent at all relevant times, was completely aware of and made no objection to decedent's receiving and

---

[3]Petitioner attempts (Pet. 14) to excuse her failure to include any of the rental income from the tract in question on her income tax returns on the ground that her status as a cash basis taxpayer relieved her of the obligation to report this income until she actually received it. The short answer to this contention is that a cash basis taxpayer may not avoid the reporting of income merely because he neglects to claim his rights and reduce it to his own possession when it is earned. See Treasury Regulations on Income Tax (1954 Code), Section 1.451-2(a) (26 C.F.R.).

reporting the income and taking all related tax deductions.[3] Decedent clearly enjoyed the most valuable incidents of economic benefit of the rental property, and thus the "enjoyment" thereof. *United States* v. *Byrum*, 408 U.S. 125, 145; *Commissioner* v. *Estate of Holmes*, 326 U.S. 480, 486. The trial court's conclusion, affirmed by the court of appeals, that petitioner's silence on the subject reflected the parties' implied agreement regarding decedent's retention of the income, was correct. In any event, this factual issue does not merit review by this Court.[4]

2. Petitioner's reliance on *United States* v. *Byrum*, *supra*, is misplaced. In *Byrum* the Court held that corporate stock was not includable in the decedent's estate under Section 2036(a)(1) merely because the decedent retained majority voting control of the companies whose shares he had transferred. As the Court noted, 408 U.S., p. 147, *Byrum* did not deal with the situation where the decedent, as here, retained an actual income interest in the transferred property.

---

[4]Petitioner asserts that after decedent conveyed to her an undivided interest in part of the property, she and decedent became co-tenants "with equal rights to occupy, use and enjoy the entire 1293 acres until the other made demand for her share***." (Pet. 13.) Aside from the fact that this assertion does not appear accurately to reflect the property law consequences of the conveyance, petitioner was unable to adduce any evidence that decedent, as "co-tenant," was acting only as petitioner's collection agent for the latter's share of the income.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

SCOTT P. CRAMPTON,
Assistant Attorney General.

RICHARD W. PERKINS,
RICHARD S. HALBERSTEIN,
Attorneys.

APRIL, 1973.

DOJ 1973 04